

ROCANELLI, J.

INTRODUCTION

This matter comes before the Court upon Plaintiff Mervin B. Johnson's Motion to Amend Complaint pursuant to Court of Common Pleas Civil Rule of Procedure 15. The parties presented their arguments before this Court on October 21, 2011, and the Court reserved its decision. For the reasons set forth below, the Court finds that "relation back" in this matter should be permitted. Plaintiff established the threshold elements prescribed by Rule 15(c) for the proposed amendment to be permitted, despite the fact that the statute of limitations has run in the meantime. Accordingly, Plaintiff's Motion to Amend Complaint to add a party and two additional claims for relief is **GRANTED** and the amended complaint shall be deemed timely insofar as the claims relate back to the original complaint filed January 27, 2011.

FACTS AND PROCEDURAL HISTORY

On January 27, 2011, Plaintiff filed a personal injury action against the Department of Transportation for the State of Delaware ("DelDOT") in this Court for injuries arising from an automobile accident that occurred on February 3, 2009. Plaintiff alleges that the subject accident occurred when his vehicle struck a salt pile that had been dumped onto the road by a DelDOT truck, which had been laying salt during an ice storm.

Plaintiff contends that he perfected service upon DelDOT on March 2, 2011. (DelDOT had asserted an affirmative defense of failure of service of process but conceded at the October 21 hearing that it had actual notice and agreed that it would not pursue the defense of failure of service of process.) Because no answer had been filed, Plaintiff moved for a default judgment, which was scheduled for a hearing on July 18, 2011. DelDOT filed an appearance and responsive pleading on July 15, 2011, and Plaintiff promptly withdrew the motion for default judgment. DelDOT did not provide answers to Form 30 Interrogatories, as required by Court of Common Pleas Civil Rule 5(b)(1).

On August 19, 2011, Plaintiff requested DelDOT's responses to Form 30 Interrogatories. As evidenced by its August 29 e-mail message, DelDOT incorrectly claimed that Form 30 Answers are not required by this Court. By September 8, 2011, DelDOT self-corrected and filed its Form 30 responses. DelDOT identified the state employee driving the DelDOT salt truck which allegedly caused the accident at issue.

A pre-trial conference was held September 20, 2011. The Order provided a filing deadline for amended pleadings of October 17, 2011. All motions had to be filed by February 13, 2012.

On September 12, 2011, Plaintiff filed a Motion to Amend Plaintiff's Complaint. Plaintiff's amended complaint denotes the form of amendment in

conformity with Court of Common Pleas Civil Rule 15(aa). DelDOT opposed the motion on the grounds that the proposed amendment does not satisfy *all* of the conditions required by Court of Common Pleas Civil Rule 15(c) and, thus, the relief should be denied. On October 21, 2011, oral argument was held and the Court reserved decision.

Trial is scheduled for March 19-20, 2012.

DISCUSSION

Plaintiff moves this Court for leave to amend the Complaint in three significant ways. First, Plaintiff seeks to add a party, Andrew Floor, whom Plaintiff alleges to be responsible for the subject accident, both individually and as an agent/employee for DelDOT. Second, the motion seeks to add a count for gross negligence thereby expanding the Complaint's negligence claim. Finally, the amendment would add a separate claim for “wanton” conduct by Mr. Floor. Plaintiff did not move to amend the prayer for relief.

Court of Common Pleas Civil Rule 15 outlines the procedure to amend a complaint in this Court and provides that “a party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served or . . . by leave of court or by written consent of the adverse party” Leave to amend is generally given in the interests of justice, unless the party opposing the

amendment shows that it will be seriously prejudiced.¹ The policy underlying the rule is “to encourage the disposition of litigation on the merits.”²

While amendments under subsection (a) of Rule 15 are to be freely given, such liberality must be tempered by the requirements outlined in subsection (c) of this rule.³ Court of Common Pleas Civil Rule 15(c) comes into play where the movant seeks to amend the complaint *after* the expiration of the statute of limitations on the claim(s).⁴ Subsection (c) establishes “a series of requirements that must be satisfied if the movant wishes to render the amendment effective as of

¹ *Id.* (citing CCP Civ. R. 15(a)); *Paul v. Chromalytics Corp.*, 343 A.2d 622, 625 (Del. Super. Ct. 1975).

² *Wilson v. Wilson*, Witham, J., 2005 WL 147942, at *1 (Del. Super. Ct. Jan. 14, 2005) (citing *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 72 (Del. 1993)).

³ *Bissell v. Papastavros' Assocs. Medical Imaging*, 626 A.2d 856 (Del. Super. Ct. 1993).

⁴ CCP Civ. R. 15(c) provides

An amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

the time of the filing of the original complaint.”⁵ Where, as here, the moving party seeks to add new parties, the analysis of the motion is controlled by Court of Common Pleas Civil Rule 15(c)(3).⁶ The discretionary powers of Court of Common Pleas Civil Rule 15(a) cannot be extrapolated to subsection (c) of this same Rule.⁷ However, the question of whether the proposed amendment satisfies the requisites imposed by subsection (c)(3) *is* a matter within the Court's discretion.⁸ Accordingly, as long as Plaintiff's proposed amendments completely comport with the dictates of Rule 15(c)(3), the relief may be granted.

Court of Common Pleas Civil Rule 15(c)(3) requires that the moving party meet *three* conditions before the amendment may be allowed. First, the claim asserted by the amendment must arise out of the same conduct, transaction or occurrence asserted in the original pleading.⁹ Second, within the time provided by the rules, the party to be added must have received notice of the action, so that the party will not be prejudiced.¹⁰ Third, within the time provided by law for commencing the action, the party to be added must have known or should have

⁵ *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

⁶ *Taylor v. Champion*, 693 A.2d 1072, 1073 (Del. 1997); *Mullen*, 625 A.2d at 263.

⁷ *Parker v. Breckin*, 620 A.2d 229 (Del. 1993).

⁸ *Mullen*, 316 A.2d at 264 (citing *Annone v. Kawasaki Motor Corp.*, 316 A. 2d 209 (Del. 1974)) (emphasis provided).

⁹ *Mullen*, 625 A.2d at 264.

¹⁰ *Id.*

known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be added by the amendment.¹¹

DelDOT correctly avers that Plaintiff must satisfy *all* of the requirements contained in Rule 15(c)(3) once the statute of limitations has run for the proposed amendment to relate back to the filing date of the original action.¹² This Court concludes that Plaintiff effectively satisfied the requirements.

DelDOT does not dispute that the claim or defense asserted in the amended pleading arose out of the same conduct, transaction or occurrence set forth, or attempted to be set forth, in the original pleading. Even though the legal theory has changed, the facts upon which the action is based remain the same.¹³

As to the second element, notice of the “institution of the action,” Plaintiff needs to establish that the party he seeks to add received notice of the lawsuit, not merely notice of a claim or allegation.¹⁴ The notice need not be formal, include service of process, nor must it be in writing.¹⁵ The Court finds that Floor had notice of the lawsuit as an employee of DelDOT, which concedes Floor was acting in the scope of his employment.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

As discussed *infra*, the Court takes note that Plaintiff filed this action on January 27, 2011. By March 2, 2011, DelDOT had notice of the suit when it was served. DelDOT did not file its Answer until July 15, 2011, when faced with a motion for default judgment. DelDOT further stalled the process by waiting until September 8, 2011 to file its Form 30 Answers, which should have been filed with its Answer. It is unfortunate that DelDOT seeks to now benefit from a delay that it arguably perpetrated. Had DelDOT simply fulfilled its obligation by filing a timely Answer and its responses to Form 30 Interrogatories, perhaps this issue could have been avoided.

Moreover, regarding this Rule's built-in mandate that "relation back" will not be permitted if the party to be added would be prejudiced, DelDOT conceded at oral argument that DelDOT will not suffer prejudice if the relief is granted and the complaint amended. The Court finds that Floor also will not be prejudiced because DelDOT concedes that it takes responsibility for Floor's actions. As a final matter, Court of Common Pleas Civil Rule 15(c)(3) not only requires "notice of the institution of the action," but it also requires that the Court inquire as to whether Floor "knew or should have known that but for a mistake concerning the identity of the party the suit would have been brought" against him.¹⁶

¹⁶ *Id.*

In paragraph 10 of his submission, Plaintiff brought to the Court's attention that a similar case has been filed in the Delaware Superior Court (C.A. No. N10C-12-234) arising out of the same factual circumstances. On March 22, 2011 Plaintiff moved to amend the complaint to add the DelDOT truck driver, Mr. Floor, and to assert claims for negligence and related damages against him. The Superior Court granted that motion on April 21, 2011. Defense counsel in the Superior Court matter is the same counsel as here.¹⁷ Mr. Floor has already been deposed in the parallel action. Mr. Floor had ample reason to know or should have known within the requisite time period that he would be named as a defendant in any action stemming from these incidences given his alleged role in the accidents. Accordingly, this Court finds that relation back should be permitted under Court of Common Pleas Civil Rule 15(c) to add Mr. Floor as a party defendant, and for the additional counts of gross negligence and wanton conduct.

As the proposed amendment clears the Court of Common Pleas Civil Rule 15(c) threshold, the Court turns its inquiry to the "interests of justice" requirement under CCP Civ. R. 15(a). To that end, the Court finds that justice requires that the proposed amendment be allowed. DelDOT added a five-month delay to the equation by its own failure to respond to the Complaint in a timely manner and to

¹⁷ *Hunt v. Brandywine Nursing and Rehabilitation Center, Inc.*, 2000 WL 12115588, at *3 (Del. Super. Ct. Aug. 18, 2000) (Rule 15(c) is not concerned about the knowledge or state of mind of the Plaintiff's counsel).

include with its Answer its responses to Form 30 Interrogatories. Plaintiff's prosecution of his claim should not be penalized for DelDOT's actions. By granting this amendment, this Court does not in any way address the viability of these claims; however, the amended complaint should be heard on the merits.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Amend Complaint is **GRANTED** and is deemed filed as of today, October 27, 2011, with the claims relating back to the original complaint filed January 27, 2011. Counsel for DelDOT shall accept service of the amended complaint on behalf of DelDOT and its employee Andrew Floor. Defendants shall serve and file an answers to the amended complaint within twenty days.

IT IS SO ORDERED this 27th day of October, 2011.

Andrea L. Rocanelli

The Hon. Andrea L. Rocanelli